UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher.

Public Utilities Commission of the State of California

Docket No. RP00-241-010

v.

El Paso Natural Gas Company,
El Paso Merchant Energy-Gas, L.P.,
and El Paso Merchant Energy Company

ORDER ON REHEARING

(Issued March 30, 2004)

1. On December 15, 2003, the Arizona Corporation Commission and the East of California Shippers[1] (jointly EOC Shippers) filed a request for rehearing of the Commission's Order on Contested Settlement issued November 14, 2003, in this proceeding (November 14, 2003 Order).[2] Also on December 15, 2003, the Public Utilities Commission of the State of California (CPUC), the City of Los Angeles, Southern California Edison Company, and Pacific Gas and Electric Company (jointly, California Parties) filed a request for rehearing of the November 14, 2003 Order.

[1] For purposes of this rehearing request, the East of California Shippers are Apache Nitrogen Products, Inc., El Paso Electric Company, El Paso Municipal Customer Group, Phelps Dodge Corporation, Public Service Company of New Mexico, Salt River Project Agricultural Improvement and Power District, Texas Gas Service Company, a division of ONEOK, Inc., and UNS Gas, Inc.

[2] Public Utilities Commission of the State of California v. El Paso Natural Gas Co., 105 FERC ¶ 61,201 (2003).

2. In the November 14, 2003 Order, the Commission accepted, as modified, the Offer of Settlement and the Joint Settlement Agreement (Settlement) in resolution of a complaint filed by CPUC against El Paso Natural Gas Company (El Paso Pipeline), El Paso Merchant Energy-Gas, L.P. and El Paso Merchant Energy Company (together, El Paso Merchant).[3] The complaint alleged that the El Paso Companies had violated the Commission's Standards of Conduct For Pipelines With Marketing Affiliates (Standards of Conduct)[4] and had manipulated the California energy markets by withholding pipeline capacity to drive up natural gas prices during the California energy crisis of 2000-2001.

3. In the November 14, 2003 Order, the Commission, inter alia, declined to sever the EOC Shippers or certain issues from the Settlement, rejected a proposal to permit dual primary firm delivery points,[5] accepted a proposed alternative dispute resolution (ADR) procedure, accepted proposed clarifications to the Block II capacity recall provisions,[6] and held that El Paso Pipeline does not have a certificated obligation to reserve 3,290 MMcf/d of firm capacity to serve California unless the pipeline has contracts in effect for that amount of capacity. The Commission also vacated initial decisions (IDs) issued by the Chief Administrative Law Judge (Chief ALJ) following the two phases of the hearing in this proceeding.[7] The Settlement was filed before the Commission issued an order on exceptions to the Phase I and Phase II IDs.

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[3] In this order, El Paso Pipeline, El Paso Merchant, and their corporate parent, El Paso Corporation, are sometimes referred to collectively as the El Paso Companies.

[4] 18 C.F.R. Part 161 (2003).

[5] California Parties state that, on December 11, 2003, they filed an Addendum to Joint Settlement Agreement. In the Addendum, the California Parties accepted the Commission's modification of the Joint Settlement Agreement to delete the dual primary delivery point provision.

[6] A previous settlement involving El Paso Pipeline established three blocks of capacity that are subject to different rights and restrictions (El Paso Pipeline 1996 Settlement). The Block II capacity is subject to conditions that allow it to be recalled to serve certain California markets. See El Paso Natural Gas Co., 79 FERC ¶ 61,028, order on reh'g, 80 FERC ¶ 61,084 (1997), remanded, Southern California Edison Co. v. FERC, 162 F.3d 116 (D.C. Cir. 1998), order on remand, 89 FERC ¶ 61,164 (1999), order on reh'g, 90 FERC ¶ 61,354 (2000).

[7] Public Utilities Commission of the State of California v. El Paso Natural Gas Co., 97 FERC ¶ 63,004 (2001) (Phase I ID); Public Utilities Commission of the State of California v. El Paso Natural Gas Co., 100 FERC ¶ 63,041 (2002) (Phase II ID).

4. As discussed below, the Commission clarifies and denies rehearing of the November 14, 2003 Order. This order is in the public interest because it resolves a lengthy and heavily contested proceeding in a manner that is consistent with the Commission's policies, as well as its orders in Docket No. RP00-336-000, et al. (Capacity Allocation Proceeding).[8] The Commission's action here also provides finality, allows customers to receive financial relief, and preserves the rights of the EOC and California shippers. The certainty achieved by the Settlement also permits parties to make long-term plans regarding their capacity and natural gas needs.

BACKGROUND

5. The background of this proceeding and its lengthy procedural history are recounted in the November 14, 2003 Order and Appendix A to that order and will not be repeated here.

6. On June 4, 2003, the California Parties, El Paso Pipeline, and El Paso Merchant (collectively, Settling Parties) filed the Settlement, which is one aspect of a comprehensive settlement that also includes a Master Settlement Agreement (MSA) and a Stipulation of Judgment (Stipulated Judgment). The MSA and Stipulated Judgment have been filed in judicial forums, and the California Parties emphasize that the effectiveness of the Settlement also depends on the courts' approval of the MSA and Stipulated Judgment. Although one court has approved the MSA, California Parties explain that they filed their request for rehearing because of possible appeals relating to the MSA. However, California Parties advise that they will withdraw their request for rehearing if both the MSA and Stipulated Judgment become effective.

7. On February 18, 2004, El Paso Pipeline filed an answer in opposition to the EOC Shippers' request for rehearing. While the Commission's rules prohibit answers to rehearing requests, the Commission accepts El Paso Pipeline's answer because it has provided additional information for the Commission's consideration in its analysis of EOC Shippers' request for rehearing. In its answer, El Paso Pipeline asserts, inter alia, that EOC Shippers are better off than they would be absent the Settlement. Moreover, states El Paso Pipeline, EOC Shippers already have received rulings in the Capacity Allocation Proceeding on the merits of claims they advanced in this proceeding.

[8] See El Paso Natural Gas Co., 99 FERC ¶ 61,244 (2002), order on clarification and adopting capacity allocation methodology, 100 FERC ¶ 61,285 (2002), order on reh'g, 104 FERC ¶ 61,045 (2003).

A. EOC Shippers' Request for Rehearing

1. Application of Legal Standard

a. EOC Shippers' Position

8. EOC Shippers maintain that the Commission did not apply its policies properly in accepting the Settlement. EOC Shippers state that, in the November 14, 2003 Order, the Commission found that the "overall outcome … is consistent with the public interest." However, EOC Shippers argue that the Commission failed to support this finding with substantial evidence of record. In fact, state EOC Shippers, this public interest finding also was fatally deficient because the Commission did not address the violations of the Standards of Conduct found by the Chief ALJ in the Phase II ID. According to EOC Shippers, the Commission summarized the "public interest" by stating that the Settlement provides finality, allows customers to receive financial relief, and preserves the rights of EOC and California shippers.[9] EOC Shippers concede that the order does bring "finality," but they assert that the fact that it "resolves a lengthy and heavily contested proceeding" is insufficient. EOC Shippers rely on Laclede Gas Company v. FERC,[10] asserting that the court in that case required more explanation from the Commission as to "why the interest in avoiding lengthy and difficult proceedings warrants acceptance of this particular settlement."

9. EOC Shippers also contend that the "financial relief" goes only to the Settling Parties and not to the pipeline's captive customers. EOC Shippers assert that neither they nor members of the Commission's Staff were permitted to participate in the Settlement discussions. Additionally, EOC Shippers argue that the Settlement does not preserve their rights, instead preserving only the rights of California shippers, because the interests of the California shippers and those of the EOC Shippers are directly at odds.

10. EOC Shippers assert that the Commission may not refuse to decide contested issues of material fact, particularly the issue of sustainable capacity on the El Paso Pipeline system and whether the pipeline withheld capacity, as the Chief ALJ found. For example, EOC Shippers point to the Commission's discussion of transient factors in the July 9, 2003 Order in the Capacity Allocation Proceeding, with its pivotal finding that El Paso Pipeline was permitted to reduce the level of its sustainable firm capacity by 210 MMcf/d for purposes of managing transient factors on its system.

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[9] EOC Shippers cite El Paso Natural Gas Co., 105 FERC ¶ 61,201, at P 5 (2003).

[10] 997 F.2d 936, 947 (D.C. Cir. 1993).

11. EOC Shippers acknowledge that the Capacity Allocation Proceeding and the complaint proceeding address certain identical issues of law and fact, as the Commission recognized in its April 14, 2003 Order in Docket No. RP00-336-000.[11] Despite that, EOC Shippers claim that the Commission failed to afford them a trial-type hearing in the Capacity Allocation Proceeding and then failed to decide these two cases exclusively on their own records. Instead, assert EOC Shippers, without any advance notice to the parties of its intent, the Commission first selectively relied on evidence from the Docket No. RP00-241-000 proceedings to justify its actions in the Capacity Allocation Proceeding and then used those findings by reference in the November 14, 2003 Order. According to EOC Shippers, if the Commission wished to consider the evidence in these two dockets together, it should have consolidated the cases for hearing and decision. Moreover, argue EOC Shippers, not all parties in the Capacity Allocation Proceeding are also parties to Docket No. RP00-241-000.[12]

b. Commission Analysis

12. The Commission denies rehearing and reiterates that the Settlement in this complaint proceeding is just and reasonable and in the public interest. EOC Shippers have not sustained any undue prejudice as a result of the Commission's acceptance of the Settlement, as modified.

13. CPUC's complaint in Docket No. RP00-241-000 alleged that El Paso Pipeline and its affiliates violated the Standards of Conduct and improperly withheld pipeline capacity to drive up the price of natural gas at the California border. CPUC's complaint sought no relief for the EOC Shippers, and the Settlement here primarily provides relief to customers on whose behalf the complaint was filed.

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[11] EOC Shippers cite El Paso Natural Gas Co., 103 FERC ¶ 61,059, at 61,196 (2003).

[12] EOC Shippers cite United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515 (1946); United States Lines, Inc. v. Federal Maritime Commission, 584 F.2d 519 (D.C. Cir. 1978). EOC Shippers also point out that Arizona Electric Power Cooperative, Inc., Arizona Public Service Company, and Pinnacle West Energy Corporation are not parties in Docket No. RP00-241-000, although each company was an active intervenor in the Capacity Allocation Proceeding, and each company is a petitioner in the consolidated appeals seeking reversal of the Commission's findings in that docket. The Commission finds that these companies are not prejudiced by the Commission's acceptance of the Settlement in this case because they have pursued their claims in the Capacity Allocation Proceeding.

14. After CPUC filed its complaint, EOC Shippers subsequently filed their own complaint in Docket No. RP01-486-000. The Commission properly exercised its discretion and considered EOC Shippers' complaint in conjunction with similar filings in the Capacity Allocation Proceeding. However, EOC Shippers participated in Docket No. RP00-241-000 in an effort to obtain relief they also pursued -- and continue to pursue -- through their participation in the Capacity Allocation Proceeding.[13] In accepting the Settlement filed in Docket No. RP00-241-000, the Commission properly declined to sever EOC Shippers, as that would have allowed them a second opportunity to pursue issues that were resolved in the Capacity Allocation Proceeding. EOC Shippers have been represented and participated in both proceedings; therefore, they have been provided a forum and full opportunity to advance their arguments concerning their rights to El Paso Pipeline's capacity.

15. The Commission rejects EOC Shippers' claim that the Commission's decisions in the November 14, 2003 Order are not based on substantial evidence. The Commission thoroughly explained the legal, policy, and factual basis for its rulings on all contested issues, including its rejection of the proposed dual primary firm delivery points[14] and the

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[13] EOC Shippers admit that the primary allegation in CPUC's complaint in this proceeding was that El Paso Pipeline and its affiliates withheld capacity so as to drive up the price of natural gas at the California border. Request for Rehearing of the Arizona Corporation Commission and the East of California Shippers, at 5-6 (December 15, 2003). They also admit that they sought to pursue issues in this proceeding that were identical to issues they had raised with no success in the Capacity Allocation Proceeding. Id. at 8-9, 14. EOC Shippers' participation in Docket No. RP00-241-000 was, as El Paso Pipeline noted, limited to the following:

> Both briefs filed by the EOC Shippers were responsive briefs. The EOC Shippers played a largely passive role in this case. They did not engage in any discovery, sponsor any testimony, tender any EOC witness for cross examination by [El Paso Pipeline], submit any evidence, or file any initial briefs that would have allowed [El Paso Pipeline] to respond directly to their claims.

Answer of El Paso Natural Gas Company In Opposition to Request for Rehearing of the Arizona Corporation Commission and the East of California Shippers, at 3 n.6 (February 18, 2004).

[14] El Paso Natural Gas Co., 105 FERC ¶ 61,201, at PP 74-82 (2003).

proposed reservation of 3,290 MMcf/d of firm capacity for California.[15] The Commission also provided a detailed analysis in support of its acceptance of the Special Master provisions[16] and the Block II recall clarifications.[17] The Commission's decisions regarding the proposals for capacity reservation, the Special Master, and the Block II recall clarifications are discussed in greater detail below.

16. The Commission previously addressed the purpose of a settlement:

> By definition, a settlement is a compromise between litigating parties, independent of a resolution on the merits of the issue involved in the litigation. Parties that enter into a settlement of the complex rate and legal issues that come before this Commission have interests beyond obtaining what they perceive as the correct and lawful rate…. Where parties have reached such a settlement agreement, there is no reason for the Commission to reject or modify that settlement, as long as the rights of parties that oppose the settlement are protected….[18]

Although the instant Settlement addresses a complaint rather than a rate filing, the Transco analysis applies here as well.

17. The Settling Parties have made it clear that they wish to end this proceeding without a determination on the merits, although they might have obtained different results or benefits from a decision on the merits. There is no requirement that the Commission must rule on the merits of a complaint before it approves a settlement resolving that complaint.

18. The Commission agrees with EOC Shippers that, in ruling on the Settlement, the Commission should address every contested issue in this proceeding, and the Commission did so here. The Commission did not address the Standards of Conduct issues because, although one provision of the Settlement addresses concerns about the relationships of El Paso Pipeline and its affiliates, EOC Shippers did not oppose that provision or otherwise raise the Standards of Conduct issue in their comments opposing

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[15] Id. at PP 142-155.

[16] Id. at PP 91-98.

[17] Id. at PP 120-124.

[18] Transcontinental Gas Pipe Line Corp., 78 FERC ¶ 61,102, at 61,362 (1997) (Transco).

the Settlement. EOC Shippers cannot raise such issues for the first time on rehearing.[19] In the November 14, 2003 Order, the Commission correctly addressed all the contested aspects of the Settlement.

19. The Commission finds no merit to EOC Shippers' claim that the Commission erred in considering in this proceeding matters from the Capacity Allocation Proceeding. Certain issues of law and fact are identical in both proceedings. Moreover, EOC Shippers participated in both proceedings. They participated extensively in the Capacity Allocation Proceeding, and the Commission found that a paper hearing was sufficient to address the issues presented there. At the same time, EOC Shippers participated to a much more limited extent in the hearing in this complaint proceeding in an effort to utilize this proceeding to obtain the relief they sought in the Capacity Allocation Proceeding. In any event, EOC Shippers participated in both this and the Capacity Allocation Proceeding to the extent they chose and had ample notice and opportunity to challenge the evidence in both proceedings. EOC Shippers have not been deprived of a forum and opportunity to present their claims.

20. As discussed in this order and in the November 14, 2003 Order, the Commission's review of the Settlement and the comments in opposition to the Settlement, has persuaded the Commission that the Settlement, as modified, is just and reasonable and in the public interest. It provides financial benefits to customers who were impacted by the alleged conduct of the El Paso Companies. It provides other benefits to all of El Paso Pipeline's shippers, including EOC Shippers. These benefits include El Paso Pipeline's commitments to complete a project that will expand the pipeline's capacity without imposition of additional reservation charges until the effective date of the pipeline's next rate case and to administer the Block II capacity recall provisions in a reasonable, objective, and more transparent manner that will allow all of El Paso Pipeline's shippers to monitor the acquisition and use of that capacity.[20] Moreover, EOC Shippers also

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[19] El Paso Pipeline maintains that EOC Shippers also raise for the first time on rehearing the issue of the pipeline's sustainable capacity. Answer of El Paso Natural Gas Company In Opposition to Request for Rehearing of the Arizona Corporation Commission and the East of California Shippers, at 4-7 (February 18, 2004). In any event, as discussed below, issues relating to the amount of El Paso Pipeline capacity were addressed thoroughly in the Capacity Allocation Proceeding.

[20] Offer of Settlement and Request for Approval of Joint Settlement Agreement, at 3-4 (June 4, 2003). Answer of El Paso Natural Gas Company In Opposition to the Request for Rehearing of the Arizona Corporation Commission and the East of California Shippers, at 2 (February 18, 2004). As a result of the Commission's action in the

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benefit from the Commission's rejection of the claim that El Paso Pipeline has a certificated obligation to reserve 3,290 MMcf/d of capacity for service to California. In doing so, the Commission has created more certainty with respect to the amount of capacity that will be available for potential acquisition by the EOC Shippers. The Commission's approval of the Settlement here does not alter the rights of El Paso Pipeline's shippers, as those rights were addressed in the Capacity Allocation Proceeding. Accordingly, rehearing is denied.

2. Special Master Provisions

a. EOC Shippers' Position

21. EOC Shippers state that the Special Master, who will sit in California and be paid by El Paso Pipeline, will be the "exclusive vehicle" for resolution of the following El Paso Pipeline commitments: (1) making 3,290 MMcf/d of firm capacity available to California; (2) refraining from adding new incremental load to the system; (3) constructing its Power-Up facilities as required by the certificate issued in Docket No. CP03-1-000; (4) obtaining tariff authority; (5) moving primary delivery points; (6) following a miles-of-haul cost allocation approach in its next rate case before the Commission; and (7) responding to data requests from the California Parties. Moreover, state EOC Shippers, the Stipulated Judgment provides that Settling Parties must seek the Commission's assistance only if there is a dispute regarding whether a matter submitted to the Special Master is in fact subject to the Commission's jurisdiction.[21] EOC Shippers contend that the Commission's decision to accept the Special Master provisions is inconsistent with its recent decision in another proceeding, in which the Commission stated:

> The effect of contract terms, such as the binding arbitration clause and the exclusive jurisdiction provision, appears to deprive the Commission of its jurisdiction under the FPA. The dispute before us involves a rate issue, which is clearly within the Commission's exclusive jurisdiction under the FPA…. The Commission has jurisdiction over the instant dispute, and

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Capacity Allocation Proceeding, the EOC Shippers now hold a portion of the Block II capacity.

[21] EOC Shippers cite Stipulated Judgment at 9.

submitting it to arbitration or referring it to the District Court in New York would only serve to delay our resolution of the matter.[22]

22. EOC Shippers state that the Commission fails to explain why the Special Master provisions do not violate the Constitution, the Natural Gas Act (NGA), the Administrative Procedure Act (APA),[23] federal decisions, and the Commission's own orders. Further, argue EOC Shippers, the Commission must require the Settling Parties to comply with Section 385.604 of the Commission's regulations, including the restrictions on the types of disputes that can be resolved through ADR. Specifically, EOC Shippers cite the Section 385.604(a)(2)(iv) prohibition on the use of ADR in cases where "[t]he matter significantly affects persons or organizations who are not parties to the proceeding" unless, as provided at Section 385.604(a)(3), the "alternative dispute resolution proceeding can be structured to avoid the identified factor or if other concerns significantly outweigh the identified factor."

23. EOC Shippers maintain that most ADR provisions are established in a pipeline's tariff or service agreements and are implemented in a non-discriminatory manner among the pipeline's customers. However, continue EOC Shippers, under the Special Master provisions, the EOC Shippers do not have the same rights enjoyed by the Settling Parties, including discovery rights and the right to object to the rulings of the Special Master even if their rights are affected by issues before the Special Master. Most important, conclude EOC Shippers, they have no right to request that specific issues be referred to the Commission.

b. Commission Analysis

24. The Commission denies rehearing on this issue. Although EOC Shippers offer numerous arguments to persuade the Commission that they should be permitted to participate in any negotiations conducted by the Special Master, EOC Shippers have cited nothing, and the Commission finds that there is nothing that prohibits the negotiations envisioned by the Special Master provisions. The Commission's jurisdiction and EOC Shippers' rights to address matters proposed to the Commission will not be affected by that process. On the other hand, the Special Master provisions will allow the Settling

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[22] EOC Shippers cite PacifiCorp v. Reliant Energy Services, Inc. 99 FERC ¶ 61,381, at 62,614 (2002) (PacifiCorp). See also Public Service Company of New Hampshire and New England Power Co., 57 FERC ¶ 63,002, at 65,011 (1991).

[23] 5 U.S.C. § 554 (2003).

Parties to resolve many areas of possible contention before resorting to formal Commission procedures.

25. EOC Shippers assert that the Commission's acceptance of the Special Master process constitutes a waiver of the Commission's exclusive jurisdiction established by Congress in the NGA. However, the Commission finds that the Special Master provisions amount to no more than a contractual commitment by the Settling Parties to address certain issues to the Special Master prior to invoking the Commission's jurisdiction. EOC Shippers cite PacifiCorp for the proposition that "the Commission has found that its exclusive statutory jurisdiction trumps the wording of any contract or settlement."[24] That is precisely the Commission's point: its jurisdiction under the NGA trumps any agreement on jurisdictional matters that may be reached by the Settling Parties with or without the aid of the Special Master.

26. For the same reason, the Commission also finds no merit to EOC Shippers' contention that the Special Master process "eviscerates the delicate constitutional separation of powers between the executive branch … and the federal judiciary."[25] The appointment of the Special Master by the court does not in any manner affect the Commission's authority and responsibility to address de novo matters resulting from the Special Master procedures on issues within the Commission's NGA jurisdiction.

27. Likewise, there is no merit to the claim that the Special Master process violates the APA or the Sunshine Act. EOC Shippers state that:

> The Administrative Procedure Act contemplates that matters within administrative agency jurisdiction (and expertise) will first be adjudicated at the agency level according to the procedures outlined by the Administrative Act, such as the holding of public hearings, an opportunity for interested parties to submit pertinent facts, arguments and offers of settlement, and the possible issuing declaratory orders to terminate a controversy or remove uncertainty.[26]

28. The Special Master will not "adjudicate" any issues as contemplated by the APA, nor will the Special Master violate the Sunshine Act. No rulings by the Special Master

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[24] Initial Comments of the Arizona Corporation Commission and the East of California Shippers In Opposition to Offer of Settlement, at 15 (June 25, 2003).

[25] Id. at 17.

[26] Id. at 18-19.

will bind the Commission on any matters within its jurisdiction, and nothing the parties agree to in accordance with the Special Master procedures will or can be effective unless and until addressed by the Commission de novo under its normal administrative procedures. The Special Master's duties involve aiding the Settling Parties in their compliance with certain contractual obligations, but does not infringe upon or diminish in any fashion the Commission's exclusive jurisdiction and responsibilities as mandated by Congress and the Commission's regulations.

29. Nothing prevents a group of parties from agreeing to a position of a course of action prior to seeking Commission approval of their agreement. Indeed, EOC Shippers have themselves collaborated on the positions they have taken in this proceeding. The fact that the Settling Parties have agreed to employ the Special Master to aid them in reaching agreement on certain issues does not change the fact that all interested parties, including EOC Shippers, will be afforded the right to notice and an opportunity to present countervailing arguments for the Commission's consideration and that the Commission will review all proposals de novo.

30. The PacifiCorp order cited by EOC Shippers does not require the Commission to reject the Special Master provisions. In that case, the Commission rejected a "binding arbitration clause" and an "exclusive jurisdiction" provision that would have vested in the federal courts of New York the authority to resolve "any disputes arising out of the agreement." The Commission also distinguished the contracts at issue in PacifiCorp from similar contracts containing a non-binding mediation requirement. With respect to the contracts containing the non-binding mediation requirement, the Commission stated that it had "held the hearing in abeyance pending the outcome of the parties' settlement efforts."[27] Further, in PacifiCorp, the Commission "strongly encourage[d] all parties involved in disputes arising from the California crisis to seriously negotiate settlements. The uncertainty and expense of continued litigation over these disputes serves the interests of neither the parties to those disputes nor the public."[28]

31. The Special Master provisions in the instant Settlement are not like the provisions the Commission rejected in PacifiCorp. As the Commission stated in the November 14, 2003 Order, "the parties to the Settlement have clearly and repeatedly stated in the JSA and the Stipulated Judgment their intent that jurisdictional issues remain

[27] PacifiCorp v. Reliant Energy Services, Inc., 99 FERC ¶ 61,381, at 62,614 n.17 (2002).

[28] Id. at 62,615-16.

within the Commission's purview."[29] The Special Master provisions are comparable to the contracts with non-binding mediation requirements that were referenced in PacifiCorp. Moreover, as stated above, the Special Master provisions do not violate the APA, NGA, the U.S. Constitution, or cases cited by EOC Shippers because the Special Master provisions establish a private contractual arrangement of the parties to address certain matters to the Special Master prior to seeking relief from the Commission. If and when these parties seek Commission action to implement a proposal, the Commission will review the proposal de novo, and all of the protections afforded by the Constitution, the NGA, the APA, the Sunshine Act, as well as protections required by judicial and Commission precedent, will be available to interested parties, including EOC Shippers.

32. Moreover, the Special Master provisions do not prevent the Commission from acting or bind the Commission's actions in any manner. For example, while the Special Master could require El Paso Pipeline to propose a miles-of-haul cost allocation approach in its next rate case, the Special Master cannot bind the Commission to accept that methodology, and EOC Shippers may challenge any such proposal in that rate case. Similarly, the Special Master could require El Paso Pipeline to seek some other form of tariff authority, but again, the EOC Shippers would have the right to contest any such proposal, and the Special Master's determination would not bind the Commission in any manner. The Settlement also provides that the Special Master may enforce El Paso Pipeline's commitment to refrain from adding incremental load to the system unless it has available capacity to serve that load. That is consistent with the directive in the Commission's May 31, 2002 Order in the Capacity Allocation Proceeding that "[El Paso Pipeline] may not enter into new firm service contracts unless it can demonstrate that it has available capacity to provide the service."[30] The Special Master procedure does not affect the Commission's authority to rule on any action El Paso Pipeline may take regarding the addition of incremental load.

33. Finally, as discussed in the November 14, 2003 Order and elsewhere in this order, the Commission firmly rejects the purported obligation of El Paso Pipeline to reserve 3,290 MMcf/d of firm capacity exclusively for California. Using the Special Master process to resolve some preliminary aspects of these contractual commitments does not bind the Commission or delay Commission action on any of these commitments any more than would settlement judge or other ADR procedures under the Commission's auspices. Accordingly, the Commission accepts the Special Master process as a means

[29] Public Utilities Commission of the State of California v. El Paso Natural Gas Co., 105 FERC ¶ 61,201, at 62,040-41 (2003).

[30] El Paso Natural Gas Co., 99 FERC ¶ 61,244, at 62,012 (2002).

for parties to resolve some preliminary issues because the Commission retains its jurisdiction to make the ultimate determinations with respect to the pipeline's obligations.

34. There is no requirement that parties to a proceeding before the Commission employ the Commission's ADR process or any other ADR process, and the Commission will not limit parties' ability to structure processes to resolve disputed issues in a manner they find appropriate, subject to the Commission's ultimate jurisdiction. For that reason, EOC Shippers' references to the Commission's ADR process are not persuasive. In the November 14, 2003 Order, the Commission cited its ADR regulations as an example of a process that affords parties an opportunity to resolve issues to the extent possible before resorting to formal Commission proceedings. Here, the parties to the Settlement have agreed to a process with the same purpose. Such a process is acceptable when it conserves the resources of the parties and the Commission without diminishing the Commission's ultimate jurisdiction.

35. The Commission also reiterates that the Settling Parties' agreement to utilize the Special Master process does not deprive the EOC Shippers of any rights they now have. As stated above, the EOC Shippers have the ability to challenge the merits of any future El Paso Pipeline filings. Further, the Special Master cannot require the Settling Parties to act in violation of any statutes or the Commission's regulations and precedent. There is no situation in which anything resulting from the Special Master procedures could adversely affect EOC Shippers before the EOC Shippers have an opportunity to comment or protest and the Commission acts de novo. Accordingly, the Commission affirms that EOC Shippers' rights are unaffected by the Special Master provisions and that these provisions do not relinquish any of the Commission's jurisdiction to the Special Master.

3. Block II Recall Provisions

a. EOC Shippers' Position

36. In the November 14, 2003 Order, the Commission summarized the Block II proposals as follows:

> Under the proposed clarifications, a shipper requesting recall of Block II capacity must first enter into a new Transportation Service Agreement with El Paso Pipeline for unsubscribed Block II capacity. The shipper will specify the term of the recall. On the day the recall is effective, the shipper requesting the recall must attempt to nominate all Block II capacity that it had under contract prior to the effective date of the recall. Further, the proposed tariff sheets establish enhanced posting requirements for El Paso Pipeline, as well as the types of notice required for recall of the Block II capacity. In addition, the proposed tariff sheets establish the sequence of Block II capacity subject to recall. In part, this section provides that

> unsubscribed capacity will be used to serve the recalling shipper's need to the extent possible, with recourse next to capacity that has been marketed to a non-PG&E-Topock delivery point unless it is being used to serve markets in PG&E's service territory. The sequence of capacity recall also includes a provision that the recall request will be filled on a pro rata basis from all shippers. The price to be paid for the recalled Block II capacity will be based on the term of the recall. Finally, the proposed clarifications establish the time limits within which El Paso Pipeline will respond to the recall requests, procedures for extension of a recall, and re-recall rights.[31]

37. EOC Shippers challenge the Commission's approval of the proposed Block II recall provisions, claiming that these provisions will deny them access to nearly 30 percent of the capacity allocated to them in the Capacity Allocation Proceeding. EOC Shippers argue that this result is unjust and unreasonable, as well as in direct contravention of the Commission's finding in the Capacity Allocation Proceeding that it was not modifying the El Paso Pipeline 1996 Settlement more than was necessary to convert full requirements (FR) contracts to contract demand (CD) contracts in order to "restore reliable service on El Paso."[32] EOC Shippers further contend that these tariff changes will create an overwhelming incentive for California shippers to recall capacity and thus, it will not be available to the EOC Shippers who are required to rely on this capacity as firm capacity under the orders in the Capacity Allocation Proceeding.

38. EOC Shippers assert that these Settlement provisions do in fact modify and undermine the El Paso Pipeline 1996 Settlement, which purportedly requires only that the recalling shipper must pay "at least" the rate paid by the shipper from whom the capacity is being recalled.[33] According to EOC Shippers, the Block II provisions in the El Paso Pipeline 1996 Settlement never were meant to ensure that the recalling shipper would be able to pay a much lower rate than it would otherwise have to pay for the same capacity, thereby gaming the system without consideration of where the capacity is most needed. Moreover, continue EOC Shippers, the opportunity for manipulation by the California shippers is purportedly enhanced by recall notice provisions, which will advertise which EOC Shippers have the cheapest Block II capacity.

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[31] El Paso Natural Gas Co., 105 FERC ¶ 61,201, at P 100 (2003).

[32] EOC Shippers cite El Paso Natural Gas Co., 105 FERC ¶ 61,262, at P 15 (2003) (Docket No. RP04-34-000); El Paso Natural Gas Co., 105 FERC ¶ 61,189, at P 2 (2003); El Paso Natural Gas Co., 104 FERC ¶ 61,045, at P 93 (2003).

[33] EOC Shippers cite El Paso Natural Gas Co., 88 FERC ¶ 61,139 (1999).

39. EOC Shippers point out that most of them are LDCs and electric utilities with large load variances. They fear that the proposed sequencing provision does not define how long capacity must be "unused" before it will be first in line for recall. As a result, state EOC Shippers, if they experience a temporary drop in demand due to weather or other unforeseen conditions, their Block II capacity could be recalled as "unused." Absent reasonable parameters for when capacity is deemed "unused," EOC Shippers maintain that this provision is unduly discriminatory as applied to them.

40. EOC Shippers also submit that, once the capacity has been recalled, there is no procedure for EOC Shippers to "re-recall" that capacity -- thus rendering it unreliable and inaccessible for whatever period of time the recalling California shippers choose to take advantage of the discounted rate. EOC Shippers maintain that the only "re-recall" scenario contemplated is where the capacity will be re-recalled to serve a market in PG&E's service territory.[34]

b. Commission Analysis

41. The Commission already has addressed EOC Shippers' arguments in the November 14, 2003 Order.[35] Further, as the Commission determined in that order, the proposed Block II provisions do not modify the El Paso Pipeline 1996 Settlement, but rather fill in some unanticipated gaps in that settlement, thereby providing more objectivity and greater certainty in the recall process. This promotes the Commission's goal of enhancing the reliability of service on El Paso Pipeline's system.

42. At the time of the El Paso Pipeline 1996 Settlement, the FR shippers did not hold, nor was it foreseen that the FR shippers would hold, any of the Block II capacity. However, as a result of the Commission's directives in the Capacity Allocation Proceeding, the former FR shippers now hold a portion of that firm capacity. Thus, it was appropriate for the Commission to consider whether the proposed clarifications to the recall process would allow that process to be administered in a fashion that is reasonable for all shippers who hold Block II capacity during the remainder of the term of the El Paso Pipeline 1996 Settlement, which expires December 31, 2005.

43. In the Capacity Allocation Proceeding, the Commission found that there was no justification for removing the restrictions on Block II capacity and held that the Block II restrictions will remain on that capacity through the end of the El Paso Pipeline 1996

[34] EOC Shippers cite Offer of Settlement and Request for Approval of Joint Settlement Agreement, Proposed Original Sheet No. 219I (June 4, 2003).

[35] El Paso Natural Gas Co., 105 FERC ¶ 61,201, at PP 120-24 (2003).

Settlement.[36] Here, the Commission is satisfied that Settling Parties have proposed reasonable clarifications for administering the Block II recall provisions without modifying the El Paso Pipeline 1996 Settlement beyond the modifications already accomplished in the Capacity Allocation Proceeding. The proposed tariff revisions limit El Paso Pipeline's discretion and allow administration of the Block II recall provisions in a reasonable manner that can be monitored by all of the pipeline's shippers. The Commission finds nothing in the Block II recall clarifications proposed in this Settlement that is inconsistent with the Commission's commitment to preserve insofar as possible the parties' agreement in the El Paso Pipeline 1996 Settlement, while at the same time achieving greater reliability on El Paso Pipeline's system.

4. Severance of Parties

a. EOC Shippers' Position

44. EOC Shippers next assail the Commission's refusal to sever them as contesting parties. They maintain that the finding that they are "no worse off" without severance is not substantiated in the order. Moreover, state EOC Shippers, the statement does not meet the "congruence of interests" standard. They claim that severance would compel the Commission to make merits findings on the issue of the sustainable capacity of the El Paso Pipeline system utilizing a complete evidentiary record. Moreover, continue EOC Shippers, the Commission would be compelled to concur with the Chief ALJ that El Paso Pipeline's actions and inactions caused the excessive pro rata curtailments, although they admit that such a finding would be inconsistent with the rationale in the Capacity Allocation Proceeding, in which the Commission found no single party at fault for the problems on El Paso Pipeline's system.

45. EOC Shippers maintain that the Commission erred when it stated that, "[b]ecause the Settlement implicates the interrelated service rights of the contesting parties and the Settling Parties, the Commission will deny the requests to sever issues or sever the contesting parties."[37] EOC Shippers assert that the November 14, 2003 Order fails to explain how the service rights of the contesting parties and Settling Parties are interrelated, or why any such service relationships should prevent severance. According to EOC Shippers, if service interrelationships were an automatic bar to severance, no pipeline could ever settle with less than all its customers; therefore, the distinction is meaningless.

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[36] El Paso Natural Gas Co., 104 FERC ¶ 61,045, at PP 173-75 (2003).

[37] El Paso Natural Gas Co., 105 FERC ¶ 61,201, at P 57 (2003).

46. EOC Shippers state that Commission precedent provides no basis for denial of the request for severance here. EOC Shippers point out that severance will not deny any party essential services, as could occur if the Settlement involved the terms under which a pipeline performed open access transportation. Further, state EOC Shippers, because there are no rate issues involved, severance does not put the pipeline at risk for recovery for its cost-of-service and does not put the EOC Shippers in a "no lose" situation. EOC Shippers further state that the Commission has held that severance is problematic when the parties contesting the settlement are not direct customers of the pipeline,[38] which is not the case here.

b. Commission Analysis

47. EOC Shippers' request for rehearing on this issue simply represents another collateral attack on the Commission's rulings in the Capacity Allocation Proceeding. It also assumes what EOC Shippers cannot know: whether the Commission would affirm the Chief ALJ's determinations. Certainly, the Commission never is "compelled" to concur with the findings of an ALJ; Commission review on exceptions would be meaningless if that were the case. EOC Shippers are seeking a result that is at odds with the Commission's holdings in the Capacity Allocation Proceeding. The Commission clarifies that its statement in the November 14, 2003 Order that the Settlement implicates the rights of the contesting parties and Settling Parties means that the rights of these parties to El Paso Pipeline's capacity already has been resolved in the Capacity Allocation Proceeding, and the Commission will not in this case revise its determinations in that proceeding.

48. As discussed above, EOC Shippers ignore the fact that CPUC's complaint sought no relief for the EOC Shippers. They chose to file a separate complaint. Dissatisfied with the rulings on their own complaint, they participated to a limited extent and only on certain issues in this complaint proceeding, seeking to convince the Commission to alter in this proceeding its rulings on issues that have been addressed and resolved in the Capacity Allocation Proceeding. The Commission finds no reason to sever the EOC Shippers from this proceeding to allow them to pursue issues that have been resolved elsewhere. Allowing them to re-litigate issues that have been resolved would not be in the public interest because it would unnecessarily prolong this case as it is drawing to a close. The Commission emphasizes that the basis for its denial of severance is that EOC

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[38] EOC Shippers cite Trailblazer Pipeline Co., 85 FERC ¶ 61,345, at 62,344-45 (1998), citing Tennessee Gas Pipeline Co., 59 FERC ¶ 61,045, at 61,173 (1992); Arkla Energy Resources, 48 FERC ¶ 61,062 (1989); United Gas Pipe Line Co., 55 FERC ¶ 61,070 (1991); reh'g denied, 64 FERC ¶ 61,014 (1993).

Shippers seek to use this proceeding to revisit issues that the Commission has resolved elsewhere.

5. Vacatur of Initial Decisions

a. EOC Shippers' Position

49. As stated above, the Chief ALJ issued two IDs following the separate phases of the hearing in this proceeding; however, Settling Parties filed the instant Settlement prior to Commission action on exceptions to the IDs. On rehearing, EOC Shippers argue that vacatur of the IDs denies the contesting parties their due process rights to a Commission ruling on the merits of the Phase II ID's finding that El Paso Pipeline was at fault for the capacity shortfalls and to then appeal such finding, should it be adverse, to the United States Court of Appeals based on the complete evidentiary record established below. EOC Shippers state that FERC's vacatur of the IDs is not in the public interest because it would deny the reviewing courts an opportunity to weigh the significance of the findings in those decisions. Moreover, continue EOC Shippers, the Commission has vacated significant portions of the evidentiary record in the proceeding that forms the basis for the Commission's decisions in the Capacity Allocation Proceeding. At the same time, the conclusions of the Capacity Allocation Proceeding are now the Commission's rationale for approving the Settlement which vacates these same decisions.

50. In the alternative, state EOC Shippers, the Commission should condition approval of the Settlement on the outcome of the appeal of the Capacity Allocation Proceeding, which is pending before the United States Court of Appeals for the District of Columbia Circuit in Arizona Corporation Commission, et al. v. FERC, Case No. 03-1206 (consolidated).

b. Commission Analysis

51. The Commission also denies rehearing on this issue. As the Commission explained above, EOC Shippers are not entitled to a merits ruling on the Phase II ID's findings concerning the capacity shortfalls. Moreover, as the EOC Shippers acknowledge, the Commission addressed that issue in the Capacity Allocation Proceeding, declining to find fault for the capacity problems on El Paso Pipeline's system, instead focusing on the resolution of those problems. By vacating the IDs, the Commission did not expunge the evidence submitted into the record in Docket No. RP00-241-000; it merely eliminated the preliminary decisions derived from that evidence. The Commission vacated the IDs to avoid the possibility that parties would attempt to rely in other proceedings on the IDs, to which the Commission accords no precedential value.

52. Finally, the Commission will not condition its acceptance of the Settlement on the outcome of judicial proceedings in the Capacity Allocation Proceeding. The Settlement resolves a complaint that did not seek relief for the EOC Shippers, but regardless of the outcome of judicial review of the Capacity Allocation Proceeding, the Settlement does provide relief to the California parties on whose behalf the complaint was filed. Thus, the Commission finds no basis for severing EOC Shippers so that they can continue to litigate a complaint when the intended beneficiaries of the Settlement are satisfied with it.

B. California Parties' Request for Rehearing

1. California Parties' Position

53. California Parties challenge the ruling in the November 14, 2003 Order that El Paso Pipeline has no certificated obligation to serve California other than through its self-implementing contracts. California Parties contend that the Commission erred when it stated that, absent such contracts, there is no Commission-enforceable certificate requirement that El Paso Pipeline serve particular customers or markets.

54. California Parties assert that section 16.3 of the El Paso Pipeline 1996 Settlement obligates El Paso Pipeline not to decrease the quantity or quality of its firm service to its customers as reflected in their contracts at the end of 1995,[39] which totaled 3,290 MMcf/d.[40] California Parties maintain that the Chief ALJ recognized this obligation,[41] and while the Commission also cited the importance of contractual commitments in PP

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[39] Settling Parties cite Ex. EPNG-14 at 40-41:

> El Paso agrees and confirms that, during the effectiveness of this Stipulation and Agreement, it will maintain and operate facilities sufficient to satisfy and perform the service obligations with respect to both quality and quantity of service imposed upon it by, and subject to the conditions applicable to, the provisions of this Stipulation and Agreement and its firm [Transportation Service Agreements] in effect on December 31, 1995.

The Commission approved the El Paso Pipeline 1996 Settlement in El Paso Natural Gas Co., 79 FERC ¶ 61,028 (1997), order on reh'g, 80 FERC ¶ 61,084 (1997), remanded, Southern California Edison Company v. FERC, 162 F.3d 116 (D.C. Cir. 1998), order on remand, 89 FERC ¶ 61,164 (1999), order on reh'g, 90 FERC ¶ 61,354 (2000).

[40] California Parties cite Tr. 1054.

[41] California Parties cite Public Utilities Commission of the State of California v. El Paso Natural Gas Co., 100 FERC ¶ 63,041 (2002).

144-145 of the November 14, 2003 Order, it continued to ignore the contractual obligation established in the El Paso Pipeline 1996 Settlement.

55. California Parties argue that the Commission has an affirmative obligation to ensure adequate flowing supplies of natural gas.[42] According to California Parties, the courts have interpreted the statute as creating "a continuing regulatory obligation, irrespective of private contractual arrangements, not to abandon any certificated obligations before obtaining authorizations from the Commission to do so."[43]

56. California Parties state that the evidence in this record clearly supports the fact that El Paso Pipeline has a certificate obligation of 3,290 MMcf/d to California, and that El Paso Pipeline has admitted as such.[44] California Parties maintain that El Paso Pipeline holds NGA Section 7(c) certificates for the facilities and the "service rendered by means of such facilities."[45]

57. Further, continue California Parties, under NGA Section 7(b),[46] a pipeline need not completely terminate its service, alter its physical premises, or shut down or disconnect a facility in order to abandon a certificate obligation.[47] According to California Parties, if a pipeline seeks to take an action that would make it incapable of meeting its certificated obligations, the pipeline must first obtain abandonment authority from the Commission containing findings "that the present or future public convenience

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[42] California Parties cite Panhandle Eastern Pipeline Co. v. FERC, 803 F.2d 726, 728 (D.C. Cir. 1986).

[43] Id. (citing United Gas Pipeline Co. v. McCombs, 442 U.S. 529 (1979); California v. Southland Royalty Co., 436 U.S. 519, 525 (1978)).

[44] California Parties cite Ex. PUC-55.

[45] California Parties cite El Paso Natural Gas Co., 5 FPC 115 (1946); El Paso Natural Gas Co., 8 FPC 726 (1949); In the Matter of San Juan Pipeline Co., 9 FPC 170, 194-95 (1950); El Paso Natural Gas Co., 11 FPC 1071, 1078 (1952); In the Matters of Pacific Northwest Pipeline Corp., 14 FPC 157, 162 (1955); El Paso Natural Gas Co., 16 FPC 1354, 1357 (1956); El Paso Natural Gas Co., 19 FPC 393, 395 (1958). See also El Paso Natural Gas Co., 40 FERC ¶ 63,047, at 65,176 (1987); El Paso Natural Gas Co., 56 FERC ¶ 61,198 (1991).

[46] 15 U.S.C. § 717f(b) (2003).

[47] California Parties cite United Gas Pipe Line Co. v. FPC, 385 U.S. 83, 86-88 (1966).

or necessity permits such abandonment."[48] However, California Parties state that, in the current proceeding, no such finding could have been made.[49]

58. California Parties assert that the Commission's regulation concerning pre-granted abandonment[50] is irrelevant in this case. According to California Parties, for this abandonment of a substantial portion of Commission-certificated facilities and service to the California market, the pertinent regulations are found in 18 C.F.R. § 157.18, which requires the interstate pipeline to file an application to abandon facilities or service, including an Exhibit W, analyzing the impact on the customers whose service will be terminated.[51] California Parties observe that El Paso Pipeline never filed an abandonment application for the facilities at issue.

2. Commission Analysis

59. The Commission denies rehearing on the issue of the alleged certificated obligation of El Paso Pipeline to serve California. The Commission addressed this issue thoroughly in the Capacity Allocation Proceeding and in the November 14, 2003 Order.

60. In the July 9, 2003 Order in the Capacity Allocation Proceeding, the Commission also addressed at length El Paso Pipeline's service obligation, including the obligation imposed by section 16.3 of the El Paso Pipeline 1996 Settlement.[52] The Commission recognized that the pipeline's obligation to expand its system at its own expense is

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[48] Id. at 91.

[49] California Parties cite Ex. SCE-198, Prepared Answering Testimony of Mendal L. Yoho at 2.

[50] 18 C.F.R. § 284.221(d) (2003).

[51] California Parties cite 18 C.F.R. § 157.18 (2003). They state that this regulation addresses abandonment of services as well as of certificated facilities. They contend that the Supreme Court explained in United Gas Pipe Line Co. v. FPC, 385 U.S. 83, 86-91 (1966), that the Commission's section 7(c) certificate orders authorized the construction of facilities and transportation service on those facilities, and the transportation service could not be abandoned by the pipeline without a section 7(b) hearing and Commission findings. See also Panhandle Eastern Pipeline Co. v. FERC, 803 F.2d 726, 728-29 (D.C. Cir. 1986) ("cessation of the … transportation of gas from a particular source is an abandonment.").

[52] El Paso Natural Gas Co., 104 FERC ¶ 61,045, at P 96, et seq. (2003).

limited by the condition that any such expansion must be economically justifiable.[53] However, the Commission also concluded that the operation of the pipeline's tariffs, contracts, and the El Paso Pipeline 1996 Settlement, as well as a previous settlement, was unjust and unreasonable. Thus, the Commission modified the previous settlements to restore reliable service on El Paso Pipeline's system.[54]

61. CPUC argued in the Capacity Allocation Proceeding that capacity made available from expiring contracts with California delivery points should not be included in the initial conversions of the FR customers and that doing so would constitute an unlawful abandonment of service. However, the Commission rejected this argument, stating that nothing in the NGA or El Paso Pipeline's contracts with its customers establishes a "certificated obligation" to serve California. If a California shipper chooses not to exercise a right of first refusal when its contract expires, the contract is abandoned, and the capacity is available for other shippers.[55] Similarly, the Commission pointed out that when the California customers turned back capacity to El Paso Pipeline prior to the El Paso Pipeline 1996 Settlement and new shippers acquired some of that capacity, the service obligation to the former customers was automatically abandoned.[56] The Commission found that it is not an unlawful abandonment of service for a customer east of California to acquire turned back or expired contract capacity from a California shipper.

62. The Commission's analysis in the November 14, 2003 Order is consistent with its rulings in the Capacity Allocation Proceeding. The Commission found that El Paso Pipeline is obligated to maintain its certificated physical facilities, but the Commission cautioned that the obligation to maintain physical facilities does not mean that El Paso Pipeline must ensure that 3,290 MMcf/d of capacity is reserved for California delivery points because the pipeline's service obligation is subject to change over time as contracts expire or are amended.[57]

63. Prior to the El Paso Pipeline 1996 Settlement, the pipeline's capacity to the California delivery points was equal to its service obligation. However, a significant

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[53] Id. at PP 99-108.

[54] Id. at P 112.

[55] Id. at PP 140-41.

[56] Id. at P 158.

[57] El Paso Natural Gas Co., 105 FERC ¶ 61,201, at PP 144-47 (2003).

portion of the capacity was turned back by California LDCs, including PG&E, which is among the California Parties seeking rehearing of the November 14, 2003 Order. When the new customers acquired that turned-back capacity, they were not obligated to serve El Paso Pipeline's historic markets. Thus, by turning back capacity to El Paso Pipeline and relying on spot market purchases, the relinquishing California shippers no longer had available to them the full 3,290 MMcf/d in service rights for delivery to California. As the Commission pointed out in the November 14, 2003 Order, much of the turned-back capacity was remarketed twice prior to El Paso Merchant's acquisition of the capacity.[58] Further, some of the capacity was marketed to an existing EOC customer to convert a portion of its FR contract to a CD contract.[59] When that customer, with an upstream delivery point, acquired the capacity, the service obligation shifted, and a partial abandonment of the prior service obligation to California was implemented automatically.

64. Finally, El Paso Pipeline's tariff permits a shipper to release its capacity to a replacement shipper, which may choose to use a delivery point upstream from California.[60] Additionally, if capacity is available, any existing shipper can choose to use an alternate delivery point within the same zone or upstream of the zone containing that shipper's primary delivery point.[61] Thus, a firm shipper with primary delivery points in California can choose to serve markets at upstream delivery points if capacity exists. Accordingly, the Commission denies rehearing and affirms its prior holding that there is

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[58] Id. at PP 9-10.

[59] See Brief Opposing Exceptions of El Paso Natural Gas Company, at 16 n.27 (November 12, 2002).

[60] See El Paso Natural Gas Company FERC Gas Tariff, Second Revised Volume No. 1A, Second Revised Sheet No. 354, General Terms and Conditions, section 28.25, Capacity Release Program, Acquired Capacity Agreement, which provides in part:

> If the Releasing Shipper does not limit the Acquiring Shipper's rights to the primary Delivery Point specified in the Notice, then the Acquiring Shipper may designate any primary Delivery Points within the same zone as the Releasing Shipper's primary Delivery Point(s), or within any upstream zone through which the released capacity passes, to the extent that capacity is available at such points.

[61] Id. Fifth Revised Sheet No. 287, section 20.13, Flexible Receipt and Delivery Point(s).

no certificated obligation to serve California other than through contracts for that capacity.

The Commission orders:

As discussed in the body of this order, the Commission denies rehearing of the November 14, 2003 Order issued in this proceeding.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Linda Mitry,
Acting Secretary.